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CHANGING HOUSE: THE LAW IN
CANADA AFFECTING A MOVE FROM
ONE ELECTED OFFICE TO ANOTHER

Current Issue Paper 160



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**CHANGING HOUSE: THE LAW IN
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INTRODUCTION

Many members of provincial legislatures have gone on to become Members of Parliament, or have come to provincial politics *after* serving in Ottawa. Some moved from provincial party leadership—sometimes from the office of premier—to federal party leadership. The last premier of Ontario was a Member of Parliament before entering provincial politics. In recent years mayors of Vancouver, Edmonton and Calgary entered provincial politics to lead provincial parties, and, in the case of two of them, to become premiers. Two former mayors of Toronto serve or recently served in federal cabinets. Two members of the Ontario legislature resigned in 1994 to run for mayoral office—one successfully, and a recent Prime Minister of Canada first tasted electoral office on a school board, as did the present Premier of Ontario, and the leader of Ontario's Liberal Party.¹

It should not be thought surprising that legislators will pursue several goals in the course of their political lifetimes; politics is a vocation, and the political life can be a strongly held taste. A yearning for new, but not unrecognizable horizons, and a desire for change (but not utter change) are common motive forces in many careers. Most career changes involve making strategic decisions and taking risks. In changes from one political career to another, some of the risks are determined by statutes: these may not require a candidate to resign a seat unless he or she takes a seat elsewhere as a result of a successful campaign; on the other hand, they may require resignation before the vote takes place, or even as a prerequisite for candidacy.

These are crucial questions for those considering a shift from one level of elected office to another. Running in several federal ridings in the same election—Sir John A. Macdonald once ran in three²—was once a favoured method of increasing one's chances, but it is no longer possible.³ Likewise, it would be a comfort to be able to keep one's seat if one lost in an attempt to be elected to another legislature or council. Provincial members who want to try local or federal politics, or MPs or municipal councillors who want to run provincially, will want to know if the cushion of their present seat may be held to soften a possible fall, or if it must be given up before the jump is made.

The answers differ depending on the jurisdictions and offices concerned.⁴ One province allows municipal politicians to run provincially without resigning until after being elected, and even saves the new provincial member the trouble of resigning by deeming resignation of the municipal seat. Another has a similar provision for

provincial members moving to municipal office. One province specifically bars nominees for a federal seat from *candidacy* for a provincial seat. Some others appear to limit their restrictions to not allowing members to sit federally and provincially at the same time.⁵

Under the headings of Canada and each of its provinces and territories, this paper tries to identify, by jurisdiction, statutory provisions that affect holders of elective office who wish to be candidates for another legislative (or local) office. It is hoped this compact account of dual-office statute law will be of particular use to those interested in moves into or out of provincial politics.

THE LAW IN CANADA AND ITS PROVINCES AND TERRITORIES

Canada

The *Constitution Act, 1967*,⁶ s. 39, disqualifies Senators from being elected to or sitting or voting in the House of Commons, and the *Canada Elections Act*,⁷ s. 77(d) and (g), provides that members of provincial or territorial legislatures are not eligible, while members, to be candidates for election to the Commons. The election of a person declared ineligible is, by virtue of s. 78(2), void. The *Parliament of Canada Act*,⁸ s. 22, says that a person who, on the day of nomination for a Commons seat, is a member of a provincial legislature may not be nominated or voted for, or be eligible for Commons membership; if such a person is nevertheless elected, the election is void. An MP who is elected to a provincial legislature and actually takes the provincial seat will make his or her election to the Commons void.

This was not the case during the first few years of Confederation. The first House of Commons had 25 members who also sat in the Ontario and Quebec legislatures; indeed, a majority of the cabinet ministers of those provinces were federal members. New Brunswick and Nova Scotia had abolished dual representation in 1869, but until Ottawa followed suit in 1873, politicians from Ontario and Quebec could try out provincial and federal politics without having to choose between one and the other.

Now, an MP will retain the Commons seat if he or she (i) was elected provincially without knowing of or consenting to the election, and (ii) resigns the provincial seat within ten days of being notified of the

election. An ineligible person can forfeit \$2,000 for each day he or she sits or votes in the House of Commons. It would be impossible today to be elected without knowing about it; but apparently, in 1873, when this provision was first enacted, an MP might not find out until after the fact, from busy and preoccupied political shock troops, that he had been successfully run in a provincial riding.

Even if the *Canada Elections Act* did not preclude a person's holding a provincial and a federal seat at the same time, the territorial and provincial election statutes (except for Newfoundland's) would narrow or eliminate the opportunities for doing so. Manitoba, Prince Edward Island and Nova Scotia do not, for example, permit *nomination* of MPs for provincial election. Saskatchewan, Ontario, New Brunswick and the Northwest Territories do not permit them to be candidates, which may amount to the same thing, as may Quebec's disqualification of MPs "for election". In three other jurisdictions, an MP seeking election to a legislative assembly could defer resignation until some time *after* nomination: B.C. provides for discarding winning votes cast (in a provincial election) for an MP; Alberta provides that an MP cannot "become" a member of the legislature; and Yukon provides that an MP may not "be" a member its legislature.

As for provincial and territory members becoming MPs, although the *Canada Elections Act* makes the matter moot, five jurisdictions address the issue in statutes: Quebec, like Ottawa, says that provincial members may not be candidates for election to the House of Commons. Nova Scotia similarly provides that they may not be nominated. Alberta does not allow provincial members to keep their seats if they "become" MPs, and British Columbia and Yukon provide that their legislators may not sit and vote as MPs.

The provincial and territorial statutes also address Senate membership and local office, and are dealt with in greater detail below.

British Columbia

British Columbia's *Constitution Act*⁹ provides that if a member of the legislature sits or votes in the House of Commons, his or her election as provincial member is void and a writ of election issues for that seat (s. 34). The statute does not require a provincial member to resign in order to *run* federally; the *Canada Election Act*, however, precludes that (see p. 2). Although it appears that a sitting MP is not specifically barred from running, s. 35 provides that if an MP receives a majority

of the votes in an election to the legislature, those votes are discarded and the runner-up (if otherwise eligible) takes the seat.

There is no statutory restriction on provincial nomination, election, or seating of members of a municipal council or school board; a mayor of Nanaimo elected provincially in 1969 kept his mayoral office while sitting provincially, but this is not usual practice.¹⁰

Alberta

A person is disqualified from membership of the Legislative Assembly by the *Conflicts of Interest Act*¹¹ if that person (i) is a member of either House of Parliament at the time of becoming a member of the Assembly, or (ii) becomes a member of either federal House while a provincial member. In neither scenario does the statute require resignation in order to *run*.

The normal practice for members of municipal councils interested in provincial office appears to be to resign before seeking election to the Legislative Assembly; but this is not required by statute. Likewise, a school board trustee need not resign in order to seek provincial office, but is disqualified from remaining as a trustee while serving as a provincial or federal member (*Local Authorities Election Act*,¹² s. 64(1)).

Saskatchewan

The *Legislative Assembly and Executive Council Act*,¹³ s. 10(d) and (e), provides that no member of either federal House is eligible for election to the provincial legislature. Thus it would appear that a federal member interested in provincial membership would have to resign before facing the provincial ballot—perhaps even in order to file nomination papers.

Neither that statute nor the *Local Government Election Act*¹⁴ in any way restrict concurrent membership in the legislature and a municipal council.

Manitoba

Manitoba's *Legislative Assembly Act*¹⁵ provides that members of the Senate, the House of Commons, or of another provincial legislature,

are not eligible for nomination as candidates for the Legislative Assembly (s. 11); the election of such a candidate is void (s. 19); and a person who on the strength of such an election actually sits or votes in the legislature can be convicted of a summary conviction offence and fined \$200 for each day he or she sits.

The *Municipal Act*¹⁶ disqualifies Senate and Commons members and members of the Legislative Assembly (s. 47(g) and (k)¹⁷) from membership of municipal councils. The *City of Winnipeg Act, 1990*¹⁸ disqualifies members of either House of Parliament from being nominated for election to city council, or from being elected to, being a member of, or remaining on the council (s. 90(1)(d)). This statute does not have a parallel provision expressly disqualifying members of the legislature from municipal office, such as the one that was added to the *Municipal Act*. The *Local Authorities Election Act*¹⁹ provides no cross-disqualifications between school board or municipal council membership, on the one hand, and provincial membership on the other.

Ontario

The *Legislative Assembly Act*²⁰ provides in s. 7(1) that no person who is a member of either federal House on the day of nomination for election to the Legislative Assembly is eligible to be a provincial candidate; if such a person nevertheless runs and wins the largest number of votes of any candidate in the riding, the person with the next greatest number of votes shall be returned.

While s. 9(1) provides that a member of the legislature cannot hold office as a member of a municipal council, the *Municipal Act*²¹ goes farther. It provides that provincial members, federal MPs and Senators are not eligible to be elected or to hold office municipally. Likewise, s. 220(4)(c) of the *Education Act* disqualifies provincial or federal members from being elected to or acting as a member of a school board.²² Thus, the *Municipal Act* and the *Education Act* require earlier resignation of an MPP interested in local office than the *Legislative Assembly Act* on its own would require. The question is—how much earlier? Upon election? Or upon nomination?

The *Municipal Elections Act*²³ appears to provide an answer. It says that anyone who is properly registered and is not otherwise disqualified may be nominated as a candidate for an office if he or she “is qualified to hold that office under an Act constituting the office” (s. 37). This suggests that the conditions that have to be met to *hold* municipal office (e.g., not being an MPP—*Municipal Act*) must be

met, by virtue of the *Municipal Elections Act*, in time for nomination. One expert's view is that it is generally the case that all qualifications and disqualifications for municipal office as set out in provincial statutes must be seen as taking effect on nomination day:²⁴ if it turns out that only one candidate has been nominated, that candidate's future entitlement to the office would date from the close of nominations, and thus all qualifications for holding the office will, in the event, have had to be met (and all disqualifications shed) by the close of nominations. On that theory it would appear that any provincial member considering local office must resign in order to file nomination papers whenever any statute forbids the concurrent holding of the two offices.

A municipal councillor may run for and be elected to the Legislative Assembly without resigning council. Section 9(2) of the *Legislative Assembly Act* deems the individual to have resigned the council seat when his or her election to the legislature is published in the *Ontario Gazette*. The election to the legislature of a person who is disqualified, ineligible or incapable of being elected is void (s. 13), and such a person forfeits \$2,000 for each day he or she sits or votes (s. 16(1)).

Quebec

Quebec's *Election Act*²⁵ provides that members of "the Parliament of Canada" (i.e., Senators and MPs) are disqualified from election to the National Assembly (s. 235(4)); and the *Act respecting the National Assembly*²⁶ provides that a seat in that legislature becomes vacant if the member is appointed to the Senate or becomes a candidate for election to the Commons or another provincial legislature (s. 17(3) and (4)).

The *Act respecting Elections and Referendums in Municipalities*²⁷ disqualifies Quebec and federal cabinet ministers from membership of municipal councils (s. 62(3)).²⁸

While members of the Assembly or of either House of Parliament who are *not* cabinet members may become a member of a municipal council, they must resign from Parliament or the Assembly within 31 days of taking the oath of municipal office, failing which they lose council membership. A council member who becomes a member of the Assembly or a federal House is disqualified from holding office on council while the other membership is continued (s. 300(4) and (5)). It appears that the practice is for members of municipal council who get elected to the National Assembly to resign municipal office rather than let s. 300 act as a suspension²⁹ of their membership.³⁰ There are no corresponding cross-disqualifications for *running*. Section 21 of the *Act Respecting School Elections*³¹ disqualifies federal and provincial

members for election as school commissioners; this appears to mean that provincial and federal members would have to resign to run.

New Brunswick

The *Elections Act*³² provides that no member of either House of Parliament is eligible to be a candidate or capable of being elected or returned as a member of the legislature (s. 48). (The Act does not appear to forbid simultaneously *sitting* federally and provincially; thus, were it not for the *Canada Elections Act*, provincial members could run and sit federally.)

The *Elections Act* also provides that neither a mayor nor a municipal councillor is eligible to be a member of the legislature (s. 48.1). Note that sections 48 and 48.1 are not symmetrically framed: a Member of Parliament has to resign to run for the provincial legislature, while a member of the council of a New Brunswick municipality may be able to defer resigning council until actually taking his or her seat in the legislature. There appear to be no cross-disqualifications involving school boards and the legislature.

Nova Scotia

The *House of Assembly Act*³³ provides that no member of either House of Parliament, and no person holding a nomination for election to the House of Commons, may be nominated for election to the legislature, or sit or vote in the legislature, until the federal membership or nomination has been resigned, and the Provincial Secretary so informed (s. 17(1)). A provincial seat becomes vacant if the incumbent becomes a Senator or is nominated for federal election (s. 19). Section 65(c) of the *Elections Act*³⁴ effectively provides that anyone ineligible under any statute for membership in the legislature is incapable of being nominated for election to the legislature.

The *Municipal Elections Act*³⁵ disqualifies members of either House of Parliament or of the legislature from membership of a municipal council (and therefore, perhaps, from candidacy for municipal office; see the discussion of Ontario's *Municipal Elections Act*, p. 6 above); but there is nothing preventing a sitting municipal politician from being a candidate for provincial election. The *School Boards Act, 1991*,³⁶ s. 10(2), disqualifies provincial and federal members from being nominated for election to, or from serving on, school boards.

Prince Edward Island

Section 16(1) of the *Legislative Assembly Act*³⁷ says that no member of either House of Parliament is eligible as a member of the legislature; and s. 36(c) of the *Election Act*³⁸ has the effect of preventing the nomination of anyone disqualified under any statute from membership.

While s. 5(3)(a) of the *City of Charlottetown Act*³⁹ disqualifies federal or provincial members as aldermen or mayors, no statute specifically disqualifies members of a municipal council from provincial membership. This has not been an issue in the province, however, since the Prince Edward Island Supreme Court decided in 1951⁴⁰ that when an alderman wins in a provincial election, the municipal office, if not then vacated by the member, becomes vacant when its incumbent's election to the legislature is noted in the provincial *Gazette*. This is precisely what is provided for in s. 9(2) of Ontario's *Legislative Assembly Act*. The *School Act, 1993*⁴¹ has no school board/legislative assembly cross-disqualifications.⁴²

Newfoundland

Newfoundland's *Elections Act, 1991*⁴³ does not say anything about the effect on provincial membership of serving municipally or federally.⁴⁴ It could be argued that any disqualification of sitting municipal politicians from running and sitting provincially (or federally) might violate s. 3 of the *Charter*⁴⁵ which provides: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."⁴⁶ It is apparently common for municipal politicians running provincially to resign municipal office upon taking their provincial seats. The *Municipalities Act*, the *St. John's Municipal Elections Act*, and the *Schools Act*⁴⁷ create no disqualifications for municipal office or school board membership based on provincial membership.

Yukon

The *Legislative Assembly Act*⁴⁸ provides that no member of either federal House or of any provincial legislature is eligible to be a member of Yukon's legislature (s. 5(1)). A Yukon member who sits and votes in another legislative body is ineligible to do so in Yukon's (s. 5(2)).

There is no restriction on municipal or school board members' sitting in the legislature. A member of the Whitehorse City Council who was elected to the Legislature in 1978 completed his municipal term even though it extended through the first 11 months of his term as Premier.⁴⁹

Northwest Territories

The *Elections Act*⁵⁰ provides that a person is not eligible to be a candidate for the legislature during membership in either House of Parliament, a provincial legislature, or Yukon's Legislative Assembly. The *Local Authorities Elections Act*⁵¹ disqualifies members of the legislature from being nominated for, or running for, municipal office or school board membership (s. 18(2)(a)).

NOTES

¹ Foreign examples can be easily found as well. Willy Brandt, a mayor of Berlin, became Chancellor of West Germany. The winner of the 1995 race for the presidency of France was a mayor of Paris (and former prime minister); one of his opponents was a municipal councillor (and former cabinet member). John Quincy Adams, not long after leaving the presidency of the United States, sought and won election to the House of Representatives where he remained until the end of his life.

² J. Patrick Boyer, *Election Law in Canada: the Law and Procedure of Federal, Provincial and Territorial Elections* (Toronto: Butterworths, 1987), vol. 1, p. 545.

³ It is specifically forbidden by some—but not all—election statutes in Canada, but even where not specifically forbidden, the practice is unknown. See Boyer, *Election Law*, p. 541, and F.F. Schindeler, *Responsible Government in Ontario* (Toronto: University of Toronto Press [1969]), p. 84.

⁴ J. Patrick Boyer's 2-volume *Election Law in Canada*, together with his *Local Elections in Canada: the Law Governing Elections of Municipal Councils, School Boards and other Authorities* (Toronto: Butterworths, 1988), constitutes the comprehensive contemporary guide to the subject of election law at all levels in Canada. It will be seen by any reader familiar with Boyer's election studies that I am broadly indebted to them in this paper.

⁵ But see the discussion (starting on p. 5) concerning the exact point at which statutory qualifications for office must be met.

⁶ 30 & 31 Vic., c. 3.

⁷ R.S.C. 1985, c. E-2.

⁸ R.S.C. 1985, c. P-1.

⁹ R.S.B.C. 1979, c. 62.

¹⁰ Telephone interviews with Robert Patterson, Chief Electoral Officer of British Columbia.

¹¹ S.A. 1991, c. C-22.1.

¹² S.A. 1991, c. L-27.5.

¹³ S.S. 1979, c. L-11.1.

¹⁴ S.S. 1979, c. L-30.1.

¹⁵ R.S.M. 1987, c. L 110.

- ¹⁶ R.S.M. 1988, c. M 225.
- ¹⁷ A recent amendment to the *Municipal Act* made by S.M. 1991-92, c. 12, s. 4.
- ¹⁸ S.M. 1989-90, c.10.
- ¹⁹ R.S.M. 1987, c. L 180.
- ²⁰ R.S.O. 1990, c. L.10.
- ²¹ R.S.O. 1990, c. M.45., s.37(1)(3.).
- ²² R.S.O. 1990, c. E.2.
- ²³ R.S.O. 1990, c. M.53.
- ²⁴ Ian Rogers, *The Law of Canadian Municipal Corporations* (Toronto: Carswell, 1990), p. 151. G.R. Clark, formerly Head of the Legislative Services Division of the City of Toronto's Department of the City Clerk, agrees that qualifications should apply from nomination even if they are not so framed in the statute, and told me, by way of illustration, of the election, some years ago, of a candidate to the Metro Separate School Board. After the vote, but before the day for taking office, the member divested herself of a disqualification for membership by resigning as a part-time teacher for the Board. The board refused to allow her to take the seat, and the runner-up became member for the ward in question. The case did not reach the courts.
- ²⁵ R.S.Q., c. E-3.3.
- ²⁶ R.S.Q., c. A-23.1.
- ²⁷ R.S.Q., c. E-2.2.
- ²⁸ The *Education Act*, R.S.Q. c. I-13.3, s. 616(a) disqualifies the Quebec Minister of Municipal Affairs and members of the Privy Council from serving as school board commissioners.
- ²⁹ Or termination?
- ³⁰ Telephone interview with an official in the Office of the Directeur général des élections du Québec.
- ³¹ R.S.Q., c. E-2.3.
- ³² R.S.N.B. 1973, c. E-3.
- ³³ R.S.N.S. 1989 (1992 Supplement), c. 1.
- ³⁴ R.S.N.S. 1989, c. 140.
- ³⁵ R.S.N.S. 1989, c. 300.

³⁶ S.N.S. 1991, c. 6.

³⁷ R.S.P.E.I. 1988, c. L-7.

³⁸ R.S.P.E.I. 1988, c. E-1.

³⁹ S.P.E.I. 1979, c. 22.

⁴⁰ *Re Charlottetown Mayoralty* (1951), 28 M.P.R. 313.

⁴¹ S.P.E.I. 1993, c. 35; chapter S-2.1 of the revised statutes.

⁴² The *School Act* it replaced (R.S.P.E.I. 1988, c. S-2), however, provided that no provincial member was eligible as a candidate for election to a school board.

⁴³ S.N. 1991, c. E-3.1.

⁴⁴ The statutes of the four western provinces and the territories are completely silent on the subject of members of municipal councils seeking election or serving as members of the legislature.

⁴⁵ Part I of the *Constitution Act, 1982*, R.S.C. 1985, App. II, No. 44.

⁴⁶ This was suggested to me by Dermot Whelan, then Chief Electoral Officer of Newfoundland, and now Chief Electoral Officer of Alberta. But Ontario, Quebec and New Brunswick's statutes, while allowing sitting municipal members to be elected to legislative assemblies, require them to resign municipal office (or deem them to have resigned) at some point after the election if they intend to sit provincially.

⁴⁷ R.S.N. 1990, chapters M-23, S-5, and S-12, respectively.

⁴⁸ R.S.Y. 1986, c. 102.

⁴⁹ The case of Premier Penikett was brought to my attention by Patrick Michael, Yukon's Chief Electoral Officer and Clerk of the Legislative Assembly.

⁵⁰ R.S.N.W.T., c. E-2.

⁵¹ R.S.N.W.T., c. L-10.

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